TAN YAW SOON & ANOR.

v.

TENG SIAN LOONG ENTERPRISE SDN. BHD.

HIGH COURT, KUCHING
DATO HAJI ABDUL KADIR BIN SULAIMAN J.
[SUIT NO. KG. 60 OF 1991]
28 OCTOBER 1993

PRACTICE & PROCEDURE: Summary judgment - Appeal from Senior Assistant Registrar - Alleged breaches committed by both parties - Whether triable issues exist - Limitation - Whether claim time barred.

CONTRACT: Agreement for development of land - Failure by developer to submit plans for approval within time stipulated - Time of the essence - Whether owners of land entitled to rescission of contract - Counterclaim by developer - Failure by owners to vacate land as required - Whether oral notice to vacate suffices.

This was an appeal by the defendant (hereinafter referred to as "the developer") against a finding in favour of the plaintiffs under O. 81 and O. 92 r. 4 of the RHC 1980. The plaintiffs had asked for rescission of the contract between themselves and the developer and a reconveyance of the lands owned by them. They also prayed for damages for breach of contract.

The facts are that on 16 March 1983 the plaintiffs, owners of certain lands entered into an agreement ("the agreement") with the developer to develop the said lands. Under Clause 2, time was stipulated to be of the essence. The dispute arose with regard to Clause 7(A) of the agreement which required the plaintiffs to deliver vacant possession within one month from the date of written notice from the developer who would by that time, under the terms, have obtained approval of the road and engineering plans. Another point of dispute was on the submission of building plans, which was required to be submitted by the developer within 6 calendar months from the date of approval of the engineering plan.

The plaintiffs executed three memoranda of transfers in accordance with the agreement. However, the project was not carried through although certain approvals had been obtained. On 27 May 1991 the plaintiffs filed a suit praying for rescission of the agreement, and a retransfer of the lands free from encumbrances, damages and costs. The developer counterclaimed for a refund of a certain amount of money paid to the plaintiffs as consideration for the transfer of the land to them. The developer also denied the breach in his defence and further pleaded that the claim was time barred.

On 23 July 1991 the plaintiffs filed an amended summons-in-chambers under O. 81 RHC 1980. They contended that the building plan was not submitted as required for approval and that they were informed by the director of the developer's from towards the end of 1990 that the project could not be carried out.

The developer conceded that the building plan had not been submitted but stated this was due to the fact that one of the plaintiffs had requested to be allowed to stay on the land when orally told to vacate. The developer argued an oral notice to vacate sufficed. In addition, the developer alleged that the same plaintiff asked them to wait until the prices of houses went up before beginning to level the land. The developer therefore lay the breach on the plaintiffs for disabling them from proceeding.

The SAR determined that the failure to give written notice to vacate pursuant to clause 7(A) of the agreement was a breach by the developer entitling the plaintiffs to rescind and sue for damages. She held that an oral notice was inadmissible under s. 92 of the Evidence Act 1950. The SAR also found that the failure to give the written notice was the catalyst to the troubles subsequently encountered and therefore it fell to the plaintiffs to determine or set their own time as to when their cause of action would arise and this was towards the end of 1990 when the plaintiffs alleged they first became aware the developer was not going ahead with the project. The claim therefore was not time barred.

The developer being dissatisfied with the finding now appeals to the High Court.

Held:

[1] The issue relating to the non-submission of the building plan cannot be resolved by affidavit evidence alone more so because the plaintiffs deny the allegation that they requested the developer to suspend the project for a time. The issue of Clause 7(A) of the agreement would not as yet arise for if there was intention to modify the terms of the agreement the question of the plaintiffs having to vacate becomes irrelevant.

[2] To decide whether or not the claim is statute-barred, the determining factor is the time the cause of action began to run. The engineering plan was submitted on 23 May 1984 and the building plan was to be submitted within 6 calendar months from the date of approval of the engineering plan. This obligation was not complied with by the defendant and the explanation for the failure has been stated in the defendant's affidavit. However, it is disputed by the plaintiffs. This issue then can only be resolved at the full trial and affidavit evidence alone is not sufficient to clear the air.

[Order set aside. Plaintiff's O. 81 application dismissed. Costs of appeal and of Court below in favour of appellant, to be taxed unless agreed].

Cases referred to:

Alloy Automotive Sdn. Bhd. v. Perusahaan Ironfield Sdn. Bhd. [1986] 1 CLJ 2/[1986] 1 MLJ 382 SC ***(refd)***

Bank Negara Malaysia v. Mohd. Ismail & Ors. [1992] 1 CLJ 627/[1992] 1 MLJ 400 SC ***(refd)***

Legislation referred to:

Contracts Act 1950, ss. 40, 66, 75, 76, 92
Evidence Act 1950, s. 92
Hire Purchase Registration Ordinance Sarawak, s. 5
Limitation Ordinance, Sarawak, s. 3
Rules of the High Court 1980, O. 14 r. 1, O. 18 r. 19(1)(a)(b)(c) & (d), O. 56 r. 1, O. 81, O. 92 r. 4

For the plaintiff - P. Phang; M/s. Reddi & Co.
For the defendant - Ernest Chua; M/s. Ernest Chua & Co.

JUDGMENT

Haji Abdul Kadir bin Sulaiman J:

This is an appeal by the defendant against the decision of the learned Senior Assistant Registrar (the SAR) given in favour of the plaintiffs in their application under O. 81, 18 r. 19(1)(b)(c) & (d) and 92 r. 4 of the Rules of the High Court 1980 (the RHC). Briefly the facts are that the plaintiffs (the Landowners) owned between them three contiguous lots (the said land) and intended the said land to be developed into a housing estate. The 1st plaintiff was the registered proprietor and beneficial owner of two parcels of land situate at 5th Mile, Jalan Penrissen, Kuching, Sarawak containing areas of 3,925 square metres and 4,128 square metres, more or less described as Lots 604 and 605 both in Block 226, Kuching North Land District respectively. The 2nd plaintiff was the registered proprietor and beneficial owner of Lot 603 containing an area of 7,932 square metres, more or less situated thereat. On 16 March 1983 they entered into an agreement (the said agreement) with the defendant as a developer. Preamble (b) to the said agreement recites that the Landowners and the defendant are desirous of developing the said land into a housing estate (the development project) consisting of various types of residential houses. Under the agreement the plaintiffs are to be entitled to eight units (four units each) of the houses to be built by the defendant on the said land (the Landowners' houses). In carrying out the development projects, clause 2 of the said agreement provides the various obligations of the defendant, of which time is of the essence. *Inter alia,* the defendant is required to prepare and submit for approval by the authorities the subdivision plans, buildings drawings and specifications and engineering drawings. The defendant is also required to construct and complete all the RC buildings on the said land in good workmanlike manner and in accordance with building drawings and specifications approved by the authority concerned. It is also required to carry out the construction and completion of all infra-structures (e.g. tarmac roads, culverts, drains, sewage system, bridges, retaining walls etc.) pertaining or relating thereto in accordance with drawings and specifications as may be approved by the authority concerned. By clauses 9, 10 and 11 the defendant shall at its own costs and expense construct the Landowners' houses in strict compliance with the approved building drawings and specifications, to be completed within 18 months from the date of approval by the authority of the building plans and RC details. For this purpose completion means when occupation permits thereto are issued by the local authority. In the event of delay on the part of the defendant, it shall pay to the plaintiffs delay compensation monthly at the rate of RM300 per month per unit which would work out to be RM2,400 for the eight units of the Landowners' houses. The arrangement as provided in clause 4 is that upon the execution of the said agreement, the plaintiffs shall forthwith execute a valid Memoranda of Transfer of the said land in favour of the Landowners *(sic)* and the total consideration to be stated in the transfer shall be RM1,185,000. As for the plaintiffs, apart from the eight units to be allotted to them by the scheme, they are to be entitled to a further sum of RM105,000 to be paid by the defendant "by way of equality of exchange" of the said land.

Consequently, three Memoranda of Transfers were registered as Instrument No. L 6008/1983, L 6009/1983 and L 6049/1983 transferring the said land of the plaintiffs to the defendant pursuant to the said agreement.

Clause 15 provides that the defendant shall sell two (2) of the eight (8) units of the Landowners' houses for and on their behalf at no less than RM135,000 per unit and all proceeds of sale therefrom shall belong absolutely to the plaintiffs.

Clauses 4 and 5 of the said agreement provide the time frame for the defendant to submit matters for the approval of the competent authority as follows:

(a) within two (2) months from date of the registration of the Memoranda of Transfer under clause 14 to submit the appropriate applications for amalgamation and subdivision of the said land for houselots.
(b) within six (6) calendar months from the date of approval of subdivision and mutation in principle, to submit the necessary engineering plans for the said land.
(c) within six (6) calendar months from the date of approval of the said engineering plans, to submit the building plans specifications.

Clause 7(A) requires the plaintiffs to deliver vacant possession of the said land to the defendant within one (1) calendar month from the date of written notice from the defendant to them stating that the approval of Road and Engineering plans for development of the said land has been obtained from the competent approving authority.

Clause 17 provides that in the event of any of the parties committing any breach of or failing to comply with any of the terms or conditions of the said agreement, the party not in default shall without prejudice to his right to claim for damages for breach of contract, be entitled to sue for specific performance against the party in default.

The plaintiffs having parted with the said land, did not get the eight units of houses as provided for in the said agreement. On 27 May 1991 they filed a suit against the defendant praying for the rescission of the said agreement, for the defendant, at its own costs and expenses, to reconvey or retransfer the said land to the plaintiffs, free from encumbrances including the charge created by the defendant over the said land, damages and costs, alleging breach of the agreement by the defendant. The defendant filed its defence and counterclaim. In its defence it denies the breach and instead alleges breach on the part of the plaintiffs and also pleads limitation against the plaintiffs' claim. The alleged breach committed by the plaintiffs, according to the defendant, is that when the engineering plan was approved on 28 February 1985, it informed the plaintiffs to vacate the said land so that it could start work on the said land but the plaintiffs requested the defendant to hold on as at that time the prices of houses had fallen and was not as good as the prices in 1983. Moreover, the 1st plaintiff requested for more time to stay so that he could continue rearing pigs for sale. It was for that reason, alleges the defendant, that it did not proceed with the submission of the building plans as there was no point in doing so. Because of the plaintiffs' alleged breach it counterclaims for a refund of the sum of RM105,000 from the plaintiffs being the cash sum paid to them being part of the consideration for the transfer of the said land to it by the plaintiffs, alternatively for specific performance of the said agreement, and damages for breach and costs. In their reply the plaintiffs denied their alleged breach and maintained that they were not barred by limitation.

On 3 October 1991, the plaintiffs applied by summons in chambers for orders pursuant to O. 14 r. 1, O. 18 r. 19(1)(b) & (c) or (d) and O. 92 r. 4 of the RHC. This summons was subsequently amended by order of Court dated 23 July 1992. By their amended summons in chambers the plaintiffs applied under O. 81, O. 18 r. 19(1)(b) & (c) or (d) and O. 92 r. 4 of the RHC:

(a) for summary judgment be entered against the defendant in terms as prayed for in the statement of claim; or alternatively
(b) for the defence and/or counterclaim dated 8 July 1991 be struck out and that judgment in terms as prayed for in the statement of claim be entered against the defendant.
(c) that the defendant do pay costs of and incidental to this application
(d) any other relief or order as the court may deem fit and just in the circumstances of the case.

It is to be noted that no application under O. 18 r. 19(1)(a) of the RHC that the defendant's pleadings be struck out on the ground that it discloses no reasonable defence, was made. It is

to be noted also that one of the orders sought for in the claim of the plaintiffs is for a rescission of the said agreement. The grounds for wanting the order for rescission is that the defendant has no defence to the claim and not on the ground that the contract was *void ab initio* on grounds of fraud, misrepresentation, etc. The grounds of the application are that:

(a) the defendant has no defence to the action or any part thereof;
(b) the defence and counterclaim of the defendant is frivolous, vexatious and is calculated to delay a fair trial of the action and an abuse of the process of court;
(c) based on the grounds set forth in the affidavit of the plaintiffs affirmed on 3 October 1991.

Perusing the grounds set forth in the said affidavit of the plaintiffs revealed that:

(a) the defendant was to complete eight units of semi-detached houses for the plaintiffs within 18 months from the date of approval of the building plans and RC details by the appropriate authorities;
(b) the consideration stipulated in the Memoranda of Transfer of the said land to the defendant was never paid;
(c) the defendant had caused the said land to be charged to the Hongkong & Shanghai Banking Corporation Limited;
(d) the building plan for the said houses have not even been submitted to the KRDC for approval;
(e) the defendant never gave the plaintiffs any notice pursuant to clause 7(A) read with clause 21(a) of the said agreement to vacate the said land or any part;
(f) at the end of 1990 the director of the defendant verbally informed the plaintiffs that the defendant was unable to carry out the terms of the said agreement; and
(g) the defendant has not treated the agreement as repudiated hence the plaintiffs' claim is not statute barred.

By praying in the alternative in respect of prayers (a) and (b) as mentioned in paragraph 3 of this judgment, the plaintiff in effect is praying for orders either under prayer (a) for summary judgment under O. 81 of the RHC for the rescission of the said agreement on the ground that the defendant has no defence to the action, or under prayer (b) for the striking out of the defendant's defence and counterclaim under O. 18 r. 19(1)(b) & (c) or (d) of the RHC and for an order that judgment be entered accordingly. As regards prayer (a) for summary judgment under O. 81, this is confirmed by the learned Counsel for the plaintiffs in her written submission dated 20 May 1993 handed in during the hearing of this appeal. As stated in the case of *Alloy Automotive Sdn. Bhd. v. Perusahaan Ironfield Sdn. Bhd.* [1986] 1 MLJ 382 SC, when an application is made under O. 81 by the plaintiff, no defence need be filed by the defendant. This is so because by r. 1(2) an application may be made against a defendant under this rule whether or not he has entered an appearance in the action. However, in this case the defence was in fact filed on 8 July 1991 long before the application by the plaintiff dated 3 October 1991.

The SAR heard the application by the plaintiff and entered summary judgment against the defendant by:

(a) ordering the rescission of the said agreement.
(b) ordering the defendant at its own costs and expenses to reconvey or retransfer the said land to the plaintiffs.
(c) ordering the defendant at its own costs to pay the plaintiffs damages to be assessed, and costs to the plaintiffs, to be taxed unless agreed.

The SAR, however, did not make any order in respect of the application by the plaintiffs for the defence and/or counterclaim dated 8 July 1991 be struck out. In her judgment, she held that since the prayer for the striking out of the defence and counterclaim is in the alternative and since she had made the decision for summary judgment, she did not make any order regarding the defence and counterclaim. The defendant being dissatisfied now appeals against the said decision giving summary judgment to the plaintiffs. The plaintiffs, however, did not appeal against the non-order made by the SAR over their applications for the striking out of the defence and/or counterclaim of the defendant. This is confirmed by the learned Counsel for the plaintiffs in her submission that she conceded that the counterclaim remains and that no appeal made by the plaintiffs against the SAR making no order/decision as regards defendant's counterclaim. She contends that the plaintiffs did not appeal because the prayer is in the

alternative and the SAR has granted prayer (a) for summary judgment only. However, she submitted that even though the counterclaim by the defendant remains and if the plaintiffs succeed on summary judgment, that summary judgment need not automatically be stayed pending the disposal of the counterclaim of the defendant. Thus the effect of the decision of the SAR is that she left the application by the plaintiffs under O. 18 of the RHC untouched. Since there is no counter appeal by the plaintiffs over their application under O. 18, this appeal before me will proceed only against the decision of the SAR in making the order pursuant to O. 81 of the RHC. The notice of appeal by the defendant is confined only to the order made by the SAR. Though an appeal under O. 56 r. 1 of the RHC is by way of rehearing, the appellate Court is not to be concerned with any matter not appealed against.

An application by a plaintiff under O. 81 of the RHC is similar to an application under O. 14 for a summary judgment on the ground that the defendant has no defence. It is established law that the Court would exercise its discretion for summary judgment only in plain and obvious cases that is, that there is no *bona fide* defence. But if the defendant satisfies the Court in such an application by the plaintiff that there is a triable issue in the matter, summary judgment will not be given to the plaintiff. The determination of whether an issue is or is not triable depends on the facts or the law arising from each case as disclosed in the affidavit evidence before the Court. A complete defence need not be shown. See *Bank Negara Malaysia v. Mohd. Ismail & Ors.* [1992] 1 MLJ 400 SC, a decision on O. 14 where the principle, in my view, is equally applicable to O. 81 RHC. At p. 408 in *Mohd. Ismail's* case, *supra,* Mohamed Azmi SCJ (delivering the majority judgment of the Court) has this to say:

> Under an O. 14 application, the duty of a judge does not end as soon as a fact is asserted by one party, and denied or disputed by the other in an affidavit. Where such assertion, denial or dispute is equivocal, or lacking in precision or is inconsistent with undisputed contemporary documents or other statements by the same deponent, or is inherently improbable in itself, then the judge has a duty to reject such assertion or denial, thereby rendering the issue not triable. In our opinion, unless this principle is adhered to, a judge is in no position to exercise his discretion judicially in an O. 14 application. Thus, apart from identifying the issues of fact or law, the court must go one step further and determine whether they are triable. This principle is sometimes expressed by the statement that a complete defence need not be shown. The defence set up need only show that there is a triable issue.
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> Where the issue raised is solely a question of law without reference to any facts or where the facts are clear and undisputed, the court should exercise its duty under O. 14. If the legal point is understood and the Court is satisfied that it is unarguable, the Court is not prevented from granting a summary judgment merely because 'the question of law is at first blush of some complexity and therefore takes a little longer to understand'. (See *Cow v. Casey and European Asian Bank AG v. Punjab & Sind Bank* at p. 516).

In *Alloy Automotive Sdn. Bhd. v. Perusahaan Ironfield Sdn. Bhd., supra,* at p. 390 Lee Hun Hoe CJ (Borneo) has this to say on an O. 81 application for summary judgment:

> The summary jurisdiction conferred by O. 81 must be used with great care. It provides a procedure similar to O. 14. Where all the issues are clear, summary judgment should be given. A defendant ought not to be shut out from defending unless it is very clear that he has no case in the action. A complete defence need not be shown. The defence set up need only show that there is a triable issue or question or that for some reason there ought to be a trial.

The application by the plaintiffs before the SAR is supported by the joint affidavits of the plaintiffs affirmed on 3 October 1991 (the plaintiffs' first affidavit) and another joint affidavit in reply affirmed on 21 February 1992 (the plaintiffs' second affidavit). The defendant filed an affidavit in opposition, affirmed by Chua Sian Liang, its secretary, on 6 November 1991 (the defendant's first affidavit) and a further affidavit in opposition affirmed by the same secretary on 22 April 1992 (the defendant's second affidavit).

Paragraphs 6, 7, 8, 10 and 11 respectively of the statement of claim of the plaintiffs state:

> 6. Since the execution of the said agreement, the defendant has failed neglected or refused to carry out the development of the said land and had not, to the knowledge of the plaintiffs, submit any subdivision engineering or building plan to the competent

authorities, in connection with the proposed development of the said land and/or required under the terms of the agreement pleaded hereinabove.

7. The defendant has been in breach of the said agreement.
8. Despite repeated requests, reminders and appeals to the defendant, the defendant has failed, neglected or refused to perform its obligations under the said agreement.
10. Since the said land was transferred to the defendant for the purposes of the development thereof, and as the defendant failed to carry out the development thereof, the same should be reconvened to the plaintiffs.
11. In the premises, the plaintiffs claim against the defendant for:

(a) an Order that the said agreement be rescinded;

Paragraphs 5, 6, 8 and 9 of the defence of the defendant state:

5. Paragraphs 6, 7 & 8 of the statement of claim are denied. The defendant will say that the plaintiffs were kept informed of each step of action taken by the defendant, such as that the application for amalgamation and subdivision was submitted to the Land & Survey on 14 July 1983, that it was approved in principle on 17 November 1983, that the engineering plan was submitted to the KRDC on 23 May 1984 and that such engineering plan was approved by the KRDC on 28 February 1985. All these matters were related to the plaintiffs, albeit not in writing.
6. Further, the defendant will say that if at all there was any breach of the agreement (which is denied) it was not on the part of the defendant but that of the plaintiffs. When the engineering plan was approved by the KRDC on 28 February 1985 the defendant duly informed the plaintiff to vacate the said land so that the defendant could start on the said land but the plaintiffs requested the defendant to hold on as at that time the prices of houses have fallen and not as good as the prices in 1983. Moreover, the 1st plaintiff as occupier of Lot 605 told the defendant to give him more time to stay on so that he could continue rearing pigs for sale hoping that the prices of semi-detached houses could go up in a few years time. It is for those reasons that the defendant did not proceed with the submission of the building plans to the relevant authorities as there was no point in doing so then. The occupier of Lot 604, the plaintiffs' sister, however vacated the said house built on that Lot leaving the plaintiffs occupying Lot 603 & 605
8. Paragraph 10 of the statement of claim is denied. The defendant will say that despite the plaintiffs' breach of the agreement the defendant is still willing and able to develop the said land into a housing estate if the plaintiffs could vacate the said land to enable the defendant to carry out such works as levelling and construction of drains and culverts as the engineering plan had already been approved by the relevant authority. In the premises the defendant will plead that the question of reconveying the said land to the plaintiffs does not arise as the defendant is entitled to specific performance of the said agreement.
9. The defendant will plead that paragraph 11 of the statement of claim is misconstrued as the plaintiffs are not entitled to rescind the said agreement as the sum of RM105,000 as consideration for the said land had been paid to the plaintiffs and the defendant had dutifully carried out his obligations. If (which is denied) the plaintiffs were entitled to rescind the said agreement the defendant will plead that such rescission is now statute-barred by the Limitation Ordinance of Sarawak (Cap 49) as the plaintiffs had failed to institute legal proceedings for rescission of the said agreement within the statutory period of three years as specified under Column 91 in the Schedule to the Limitation Ordinance, Sarawak (Cap 49). Hence, for this reason alone the defendant will plead that the plaintiffs' suit ought to be dismissed pursuant to s. 3 of the Limitation Ordinance, Sarawak.

Coming now to the affidavits filed by the parties in the application of the plaintiffs before the SAR. The first affidavit of the plaintiffs *inter alia,* contained as follows:

5. By clause 11 of the agreement, the developer was to complete for us eight (8) units of semi-detached houses (hereinafter referred to as "the houses") within eighteen (18) months from date of approval of the "building plans and RC details" by the appropriate authorities.
9. To the best of our knowledge, information and belief, the building plan for the said houses have not even been submitted to the Kuching Rural District Council, being the local authority having jurisdiction over the said land for approval.
10. The defendant never gave us any notice pursuant to clause 7(A) read with clause 21(a) of the said agreement, to vacate the said land or any part.
13. We were not aware that the defendant was not going to perform the agreement until the

defendant's said Director verbally informed us at the end of last year that the defendant was unable to carry out the terms of the agreement.

15. As such, our claim herein is not statute barred by virtue of the Limitation Ordinance of Sarawak.

The first affidavit in opposition of the defendant *inter alia*, contained as follows:

3. As regards paragraphs 4 and 5 of the said affidavit the defendant will say that pursuant to clause 2(a), read with clause 4 of the said agreement the defendant duly submitted to the relevant authority an application for amalgamation and subdivision of the said land. A copy of the defendant's letter dated 14 July 1983 to that effect is now shown to me and exhibited hereto marked as "CSL-1". As such, the defendant will say that it has duly performed its obligations under the said agreement.
4. Further, the defendant will say that after the Land and Survey Department had approved in principle the defendant's application for amalgamation and subdivision of the said land in November 1983 the defendant, pursuant to clause 5(a) of the said agreement submitted 3 sets of engineering plan in respect of the said land to the Land and Survey Department for consideration and approval. A copy of a letter dated 23 May 1984 to that effect is now shown to me and exhibited hereto marked as "CSL-2".
5. On or about 28 February 1985 the defendant was duly informed by the Land and Survey Department that the engineering plan submitted by the defendant on 23 May 1984 had been approved. A copy of the letter dated 28 February 1985 from the Superintendent, Land & Survey Department, First Division is now shown to me and exhibited hereto marked as "CSL-3".
6. Soon after the defendant had received the approval of the engineering plan from the Land & Survey Department, I approached the plaintiffs personally to inform them of the same and asked them to vacate the said land so that the defendant could carry on with the development of the said land, such as levelling and earth filling of the said land. But to the defendant's surprise the plaintiffs requested the defendant to hold on with the project for the reasons stated in paragraph 6 of the Defence dated 8 July 1991 filed herein. The defendant accordingly obliged and hence did not proceed with the submission of the building plan as there was no point in doing so. In the premises the defendant will say that the plaintiffs were in breach of clause 7(A) of the agreement and that clauses 5(b) and 11 of the said agreement were effectively rendered inoperative by the plaintiffs.
9. I respectfully crave leave to refer to paragraph 9 of the affidavit. As explained under paragraph 6 hereof there is no point in submitting any building plan to KRDC as no infrastructural works had been carried out. The defendant will further aver that if the plaintiffs had not requested the defendant to hold on with the project and had vacated the said land the defendant would have carried out the infrastructural works according to the approved engineering plan and would also have duly submitted the building plan to the approving authority.
10. Paragraph 10 of the affidavit is denied. I will aver that *albeit* written notice was not given I personally went to see the plaintiffs in their house soon after the defendant had received the letter of approval marked as "CSL-3" to inform them that the authority had approved the defendant's engineering plan. I also requested them to vacate the house as soon as possible so that the defendant could carry on with the levelling and earth-filling works on the said land. However, for the reasons stated in paragraph 6 of the defence the plaintiffs requested the defendant to hold on with the project. The plaintiffs' sister, occupier of Lot 604 however moved out of the house subsequent to my visit.

The second affidavit of the plaintiffs *inter alia*, contained as follows:

3. We have never been informed of any application by the defendant for amalgamation and subdivision of the land in question or the submission of any engineering plan by the defendant.
4. The documents exhibited as "CSL-1", and "CSL-2" and "CSL-3" of the affidavit in opposition were never shown to us by the defendant prior to the commencement of this action.

The second affidavit in opposition of the defendant *inter alia*, contained as follows:

4. I deny paragraphs 3 and 4 of the said affidavit In reply and wish to say that about two weeks prior to the submission of the application for amalgamation and subdivision of the said lands, that is, on or about the 3 July 1983 (which was a Sunday), I visited the plaintiffs and showed to them a copy of the layout plan. A copy of the said layout plan that had been shown to the plaintiffs is now produced to me and exhibited hereto marked as "CSL-4".

5. I will further aver that on or about 29 April 1984, that is, on a Sunday, I visited the plaintiffs and showed them a copy of a levelling plan which wag drawn up by the defendant prior to drawing up the engineering plan. A copy of the levelling plan which was shown to the plaintiffs on or about 29 April 1984 is now produced to me and exhibited hereto marked as exhibit "CSL-5".
6. A few days before I submitted the engineering plan to the Land & Survey Department vide our letter dated 23 May 1984 (marked as exhibit "CSL-2") I visited the plaintiffs to show them a copy of the engineering plan. That visit to the plaintiffs was on a Sunday, on or about 20 May 1984. A copy of the engineering plan that had been shown to the plaintiffs before I submitted to the Land & Survey Department is now produced to me and exhibited hereto marked as "CSL-6".
7. A few days after the defendant had received a letter of approval of the engineering plan dated 28 February 1985 exhibited as "CSL-3" I personally went to see the plaintiffs on Sunday, 3 March 1985 to tell them of such approval and to show them the said letter from the Land & Survey Department. On that day I also requested the plaintiffs to vacate the house as soon as possible so that the defendant could carry on with the levelling and earth-filling works on the said lands. In the premises, paragraph 5 of the said affidavit in reply is denied.
8. In view of the matters aforesaid I am advised and I verily believe that the defendant had performed its obligations under the agreement and that it was the plaintiffs who had breached the agreement.

Thus looking at the pleadings and the affidavits filed by the parties, the root of the problem starts with the plaintiffs remaining on the said land and the defendant did not submit the building plan for approval to enable the development project to continue as envisaged by the said agreement. The plaintiffs did not vacate the said land to enable the defendant to take vacant possession thereof pursuant to clause 7(A) of the said agreement on the ground that no written notice to do so was ever given to them by the defendant. This is conceded to by the learned Counsel for the defendant but submitted that only verbal notice was given and that would suffice. On the issue of submission of the building plan, it is also conceded on behalf of the defendant but for reasons stated in the affidavit. In the circumstances, the plaintiffs say that the defendant is in breach of the said agreement for not proceeding to submit the building plan for approval hence the development project fails. The defendant on the other hand says that it is the plaintiffs who are in breach for failing to vacate the land thereby disabling them from proceeding further with the project. Up to the date of the filing of the action for rescission by the plaintiffs, the defendant says that more than three years has elapsed since the cause of action commenced. The plaintiffs on the other hand says that they are within time as they became aware of the defendant's refusal to carry on with the project only towards the end of 1990. On these facts, the question to decide is whether the defendant has any defence to the action filed by the plaintiff.

The SAR in deciding the application of the plaintiffs for summary judgment against the defendant addressed her mind on the two issues. On the first issue she held that the defendant has failed to fulfil its obligation under clause 2(b) to (h) of the agreement. The failure of the defendant to give written notice to the plaintiffs pursuant to clause 7(A) of the said agreement exonerate the plaintiffs from any blame. An oral notice to vacate is inadmissible under s. 92 of the Evidence Act 1950. As such the agreement is rescinded under s. 40 of the Contracts Act 1950 and the plaintiffs are entitled to claim for damages under s. 75 sic, 76 of the said Act and to the return of the said land under s. 66 thereof. On the second issue, she accepted that there is grave dispute between the plaintiffs and the defendant as to the date when the plaintiffs can treat the contract as rescinded, that is, the date when the cause of action begins to run. She found the catalyst to their trouble in the defendant's failure to give the said written notice whereby the plaintiffs are at liberty to set their own time as to when their cause of action would arise as all future obligations of both parties are contingent upon this notice being sent. The fact that it was not sent means that the plaintiffs have every right to sit and wait for it. The plaintiffs waited until the letter of demand was sent to the defendant on 4 July 1991. This letter of demand referred to by the SAR is exhibit "C" to the plaintiffs' first affidavit. Incidentally the said exhibit was dated 4 April 1991 and not 4 July 1991. This letter is from the Counsel for the plaintiffs to the defendant giving the defendant 21 days from the date thereof to reconvey the said lands to the plaintiffs. So according to her, the cause of action began to run not from the date the defendant verbally informed the plaintiffs to vacate, around the 3

March 1985 but the date as alleged by the plaintiff, that is, at the end of 1990 and therefore the action by the plaintiff is not statute barred. Hence the defendant has failed to raise any triable issues and therefore, judgment against the defendant entered in terms prayed for in the minutes of the judgment with costs to the plaintiffs to be taxed unless agreed.

The question to decide is whether the defendant by the said defence and the affidavit in opposition has satisfied the Court that it has a *bona fide* arguable defence which ought to be tried. The SAR did not accept this allegation of the defendant as an oral notice to vacate is inadmissible under s. 92 of the Evidence Act 1950 and not in compliance with clause 7(A) of the said agreement which requires a written notice. However, she failed to consider whether if what the defendant alleges is true in explaining the reason as to why it did not proceed to submit the building plan for approval as required under the agreement, then that oral statement by the plaintiffs asking the defendant to hold on with the development project amounted to a modification of the contractual term by the plaintiffs, thereby suspending the defendant from having to comply with the terms of clause 5(b) of the said agreement in requiring the submission by the defendant of the building plan and specification to the authority for approval within six calendar months from the date of the approval of the engineering plan. If it so modifies the contract though not in writing it would be admissible under proviso (d) to s. 92 of the Contracts Act 1950. By the statement and conduct of the plaintiffs, the term of the said agreement would be modified in the sense that the plaintiffs would not want the project to carry on as yet for the reason alleged to have been given to the defendant and that by implication would not want the defendant to proceed with the submission of the building plan for approval as yet. For once the approval is obtained, the physical development of the project would then commence. The plaintiffs did not want this to happen as yet for the reason explained by the defendant. This issue to determine the reason for not submitting the building plan by the defendant as scheduled cannot be resolved by affidavit evidence alone and this issue can be resolved only at the trial of the action. So this issue is a triable one more so when the plaintiffs by their affidavit deny such an allegation by the defendant. The issue of clause 7(A) of the said agreement would not as yet have arisen for if there was intention to modify the terms of the said agreement the question of the plaintiffs having to vacate becomes irrelevant. The learned Counsel for the plaintiffs submitted that proviso (d) to s. 92 does not apply because the said agreement was duly stamped, and registered according to the law as to registration of document, that is, the Hire Purchase Registration Ordinance (Cap 71 of Sarawak). I see no merit in the submissions because firstly, the said agreement is not a hire-purchase agreement. Even if it is a hire-purchase agreement it is not in respect of movable property and further the agreement was not registered by the authority having power to register the agreement under the Ordinance. Counsel says the registration was done pursuant to s. 5 of the Ordinance. For the reasons given, despite the wide scope provided by s. 5, I would not consider the words "any document" therein mentioned would mean any document whatsoever. It must mean any document having to do with hire-purchase. In any event, even if I am wrong in giving the interpretation, the registration under s. 5 in this case for the reason I stated earlier was not done in accordance "to the law in force for the time being as to registration of documents" spelt out by proviso (d) to s. 92 of the Evidence Act 1950. It is not in dispute that the said agreement is not one which by law is required to be in writing. In the circumstances, the purported oral statement of the plaintiffs to the defendant as stated in both paragraph 6 of the Defence of the defendant and the first affidavit in opposition constitute an important issue to be tried. Thus the defence of the defendant on this ground cannot be brushed aside without the matter going for trial.

Another defence put up by the defendant is that the action by the plaintiffs for the rescission of the said agreement is statute-barred. To decide whether or not it is statute barred it depends on when the cause of action begins to run. The defendant says it was from the 3 March 1985 as stated in paragraph 7 of its second affidavit in opposition but the plaintiffs says it was from the end of 1990 as shown at paragraph 13 of their first affidavit in support of this application. According to the submission by the learned Counsel for the plaintiffs, the breach of the said agreement alleged against the defendant is for failure to get building plan approved and failure to complete the houses within 18 months from the date of approval of building plan. The submission by the learned Counsel for the

defendant, on the other hand is to the effect that the defendant is not in breach because it was asked not to proceed with the next course of obligation under the agreement, that is, the approval of the building plan. The plaintiffs wanted to stay on the project land longer to wait for the price of houses to rise. To my mind this is a serious question to be tried. The three memoranda of transfer of the said land were registered in the third week of May 1983. See exhibits "B1", "B2" and "B3" to the first affidavit of the plaintiffs. Clause 4 of the said agreement requires the submission of applications for amalgamation and subdivision of the said land within two months from the date of registration of the memoranda. If this was not done by the defendant, the cause of action for the breach would have arisen around July 1983. The defendant has tendered as evidence that it had done so by a letter dated 14 July 1983: see exhibit CSL-1. Of course, the plaintiffs deny knowledge of the defendant's action. The said agreement made no mention that such action by the defendant needs to be notified to the plaintiffs. Clause 5(a) requires the defendant to submit the engineering plans within 6 calendar months from the date of approval of subdivision and mutation. Exhibit CSL-2 of the defendant shows that it was done on 23 May 1984. Exhibit CSL-3 dated 28 February 1985 is the approval of the engineering plans given by the authority. Clause 5(b) of the said agreement requires the defendant to submit the building plans and specification for approval within 6 calendar months from the date of approval of the engineering plan. It was this step of the obligation of the defendant under the said agreement that was not done. Naturally without the building plans and specification approved, the building of houses cannot take place. On the evidence available in CSL-3 the cause of action would appear to begin to run six months after such approval of the engineering plan given. But these issues are in dispute. It can be resolved only at the full trial of the action and affidavit evidence alone would not help to resolve the issue.

So for the reasons given, the SAR was wrong in granting the summary judgment to the plaintiffs on their application under O. 81 of the RHC where triable issues are involved. I therefore set aside the order, dismiss the application of the plaintiffs, and order that the suit shall proceed to trial. Costs of appeal and the Court below to appellant to be taxed unless agreed.

THE CO-OPERATIVE CENTRAL BANK LTD. (IN RECEIVERSHIP) & 2 ORS.

v.

THE INDUSTRIAL COURT OF MALAYSIA & 3 ORS.

HIGH COURT, KUALA LUMPUR
DATO' HJ. ABU MANSOR BIN ALI J.
[ORIGINATING MOTION NO. R8-25-135-89]
23 MARCH 1994

RECEIVERS: Court appointed - Pursuant to Emergency Regulations - Prior leave of Court to sue required - Decision of Supreme Court - To be accorded respect by the High Court - Judicial precedents - Personal liability of receivers - No question of - Unjust to make receivers personally liable - Will frighten away would be future receivers.

Tuan Haji Zainal Abidin Putih and Tuan Haji Ahmad Kamal Bin Abdullah Al-Yafii, the 2nd and 3rd Applicants were appointed receivers of the 1st applicant The Co-operative Central Bank Ltd. ("CCB"), by an order of the Court dated 7 March 1989. As receivers, they were charged with the duty to manage and assume the duties of the directors of CCB.

In proceedings instituted in the Industrial Court in Malaysia by a number of ex-employees of CCB, the Industrial Court rejected an objection taken on behalf of the applicants that prior leave of the Court has got to be obtained before the ex-employees can proceed against them as the receivers of CCB, and handed down an award, holding that no such leave was required. The Industrial Court further in its award ordered that the applicants as the receivers of CCB be joined as a party to the proceeding in the said Court, in their personal capacity.

The applicants applied to the High Court for an order of *certiorari* to remove into the High Court the award of the Industrial Court for the purpose of it being quashed and for a further order of *prohibition* to prohibit the Industrial Court from proceeding further with the cases before that Court.

Issues:

1. Was prior leave of the High Court necessary before proceedings could be instituted in the Industrial Court against the applicants, receivers of CCB?
2. Was the Industrial Court in error, in law, in ordering the applicants to be joint in as